U.S. Department of Labor

Board of Alien Labor Certification Appeals
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Date: **July 13, 2000**
Case No.: **1999-INA-281**
CO No.: **P1999-CT-01274**

In the Matter of:

VIRGINIA RUSSOTTI,
Employer,

on behalf of

CARMEN RIVERA
Alien.

Appearances: Cynthia R. Exner
For Employer and Alien

Certifying Officer: Raimundo A. Lopez
Boston, Massachusetts

Before: Burke, Wood and Vittone
Administrative Law Judges

DECISION AND ORDER

Per Curiam.

This case arises from an application for labor certification pursuant to Section 212(a)(5)(A) of the Immigration and Nationality Act, as amended, 8 U.S.C. § 1182(a)(5)(A) (the "Act") and the regulations promulgated thereunder, 20 C.F.R. Part 656. The Certifying Officer ("CO") of the U.S. Department of Labor denied the application and Employer requested review pursuant to 20 C.F.R. § 656.26. This decision is based on the record upon which the CO denied certification and Employer's request for review, as contained in an Appeal File ("AF"), and any written argument of the parties. 20 C.F.R. § 656.27(c).

Under section 212(a)(5) of the Act, as amended, an alien seeking to enter the United States for the purpose of performing skilled or unskilled labor is ineligible to receive labor certification unless the Secretary of Labor has determined and certified to the Secretary of State and Attorney General that, at the time of application for a visa and admission into the United States and at the place where the alien is to perform the work: (1) there are not sufficient workers in the United States who are able, willing, qualified, and available; and (2) the employment of the alien will not adversely affect the wages and working conditions of United States workers similarly employed

STATEMENT OF THE CASE

On October 24, 1997, Virginia Russotti ("Employer") filed an application for labor certification to enable Carmen Rivera ("Alien") to fill the position of Domestic Cook. (AF 54). The job duties for the position are:

> Plans menus and cooks meals in private home for 82 year old woman. Peels, washes trims vegetables/meats, cooks, bakes, boils, broils, fries. Cleans kitchen area dining area, utensils, serves meals for special diet. *Id.*

On May 18, 1999, the CO issued a Notice of Findings ("NOF") proposing to deny labor certification. (AF 26-28). The CO found Employer to be in violation of § 656.20(c)(8), which requires that the job opportunity be clearly open to any qualified U.S. worker. The CO noted further that Employer's application contained insufficient information to determine whether the position of Domestic Cook actually exists or whether the job was created solely for the purpose of qualifying the alien as a skilled worker under current immigration law.

The CO instructed Employer to explain in rebuttal why the position of Domestic Cook in her household should be considered a bona fide job opportunity rather than a job opportunity that was created solely for the purpose of classifying the alien as a "skilled worker." The CO further instructed that Employer's rebuttal documentation must include all requested documentation as well as responses to a series of questions posed in the NOF. The CO explained that Employer's documentary evidence along with her responses to the questions posed would be reviewed as a whole to determine whether the position of Domestic Cook actually existed in her household. (AF 27).

On June 4, 1999, Employer submitted a rebuttal to the Notice of Findings ("NOF"). (AF 8-25). Employer asserted that although she was the sole member of the household and in relatively good health, she was 83 years old, and, since Employer couldn't see as well as she used to and had become more forgetful as time had passed, a domestic cook was necessary because it had become increasingly difficult for Employer to reach items on shelves or in cabinets, stand for long periods of time cooking or cleaning up, and possess the dexterity to open jars and cans as well as she used to. (AF 9).

In response to the questions posed by the CO in the NOF, Employer submitted the proposed work schedule for the alien which included not only the length of time required to prepare the meals each day, and the specific duties involved, but also verified that the only person for whom the meals were to be prepared for was the employer herself. Additionally, Employer stated that she lived alone, did not entertain frequently, had no pre-school aged children residing in the household, had tried to remain as independent as possible and therefore had never employed a cook before, had not hired or employed the alien to date, had learned of the alien from her daughter-in-law, and had no relationship with the alien. (AF 10). Also submitted was a copy of Employer's 1998 Tax Return, as well as a copy of Employer's Savings and Loan bank account from 1995 to present, and a copy of another of Employer's Savings accounts from 1996 to the present. (AF 11-25).

On July 14, 1999, the CO issued a Final Determination ("FD") denying certification (AF 6-7). The CO noted that Employer's rebuttal did not establish that there is a bona fide position for a domestic cook in her household for various reasons. (AF 7). The CO stated that although Employer had indicated that she was 83 years old and the sole member of the household, Employer had failed in rebuttal to respond to or submit any documentation regarding the CO's request concerning the presence of any dietary restrictions. Further, the CO noted that in specifying the duties involved with the position, Employer's statements that the alien would "assist the employer in eating as necessary in addition to normal preparation, cooking, and clean up tasks," combined with the fact that Employer did not employ any other domestic staff and had previously never employed a cook, demonstrated that it was more likely that the alien would be employed as a General Care Giver rather than as a Domestic Cook. Additionally, the CO stated that because Employer had met the alien through Employer's daughter-in-law a special relationship existed between the two individuals. Finally, the CO questioned the likelihood that Employer would devote such a great proportion of her gross income (90%) to pay the salary for the position of Domestic Cook and yet retain the duties of grocery shopping, cleaning and laundry for the employer herself or other family members when visiting. *Id*.

On July 30, 1999, the CO denied the Employer's request for review of the denial of certification and subsequently forwarded this matter to the Board of Alien Labor Certification Appeals for review. (AF 1-5).

DISCUSSION

Section 656.20(c)(8) of the Department's labor certification regulations requires that the employer offer a *bona fide* job opportunity. Whether a job opportunity is *bona fide* is gauged by a "totality of the circumstances" test. *See Modular Container Systems, Inc.*, 1989-INA-228 (July 16, 1991) (*en banc*), *cited in, Carlos Uy III*, 1997-INA-304 (Mar. 3, 1999) (*en banc*). .

In the NOF dated May 18, 1999, the CO in attempting to ascertain whether a bona fide job opportunity actually was offered, directed Employer to explain why the position of domestic cook in its household should be considered a bona fide job opportunity rather than a job opportunity that was

created solely for the purpose of immigration. (AF 26-28). The CO in utilizing this "totality of the circumstances" test, posed a series of questions to Employer and explained that Employer's documentary evidence along with her responses to the questions posed would be reviewed as a whole to determine whether the position of domestic cook actually existed in her household. (AF 27).

However, in rebuttal, although Employer did respond to most of the questions posed in the NOF, the CO in assessing this "totality test"noted several deficiencies and thus denied certification. (AF 6-7). Based upon the evidence presented we agree with the determination of the CO that the Employer's rebuttal did not establish that there is a bona fide position for a domestic cook in her household.

First, in rebuttal, Employer made no attempt to respond, explain or submit any documentation regarding the CO's request concerning the possible presence of special dietary restrictions. (AF 8-25). 20 CFR § 656.25 (e)(3) provides that the Employer's rebuttal evidence must rebut all the findings of the NOF, and that all findings not rebutted are deemed admitted. *Our Lady of Guadalupe School*, 1988-INA-313 (June 2, 1989). In fact, Employer's first mention of this matter came in her request for review of the denial of certification. (AF 2-5). It is well established that rebuttal evidence submitted after issuance of the Final Determination along with the request for review is not part of the record and can not be considered on appeal pursuant to 20 C.F.R. 656.27(c). *Memorial Granite*, 1994-INA-66 (Dec. 23, 1994). Moreover, an employer cannot supplement the record on appeal. *See, e.g., Luna Restaurant*, 1991-INA-374 (June 30, 1993). Therefore, all assertions, arguments and additional documentation submitted subsequent to the issuance of the FD will not be considered.

Second, Employer in responding to the inquiry regarding the percentage of her disposable income that would be devoted to paying the alien's salary, submitted a copy of her 1998 Tax Return and also copies of two separate interest bearing savings accounts. However, the CO's inquiry was directed at and confined to the percentage of the employer's *disposable income* that would be used to pay the salary of the alien. (AF 28). The amount of Employer's total adjusted gross income, when looked at against the salary Employer was to pay the alien[1], raised a legitimate concern regarding the likelihood that an employer would devote such a great proportion of her gross income (90%) to pay the salary for the position. Thus, it was incumbent upon Employer to supplement these documents and fully explain, justify or assert in rebuttal her plan to pay the salary of the alien not only from the income she derived in the form of interest but also from the savings itself.[2] It is the Employer's burden at the time of rebuttal to submit a record sufficient to establish that a certification should be issued. § 656.25(e)

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[1]$8.77 per hour, 40 hrs a week (AF 54-58) totaling approximately $350.80 per week, $1,403.20 per month and $16,838.40 per year excluding taxes.

[2]This also is an argument first made by Employer in its Request for review of the denial of certification. (AF 2-5). *See Memorial Granite*, 1994-INA-66 (Dec. 23, 1994); *Luna Restaurant*, 1991-INA-374 (June 30, 1993).

Third, Employer in submitting the proposed work schedule and specifying the duties involved with the position of domestic cook, stated that the alien would "assist me in eating as necessary" in addition to normal preparation, cooking, and clean up tasks. (AF 9-10). The DOT contemplates that the cook confines his or her duties to the kitchen. Once he or she is expected to perform any of the other multiple duties of the house worker, the position is that of a house worker. *In The Matter of Glenn K. Garnes*, 1994-INA-17 (May 15, 1995). This fact combined with the fact that Employer did not employ any other domestic staff and had previously never employed a cook, lends credence to the CO's assessment that Employer not only mis-characterized the position offered but also that it was more likely that the alien would be employed as a General Care Giver rather than as a Domestic Cook

Finally, although Employer acknowledged that she learned of the alien through a recommendation from her daughter-in-law, the formation of a special relationship between the two is not always the necessary result. While a family relationship between the employer and employee promotes a higher level of scrutiny, it does not per se require denial of certification. *See Paris Bakery Corporation*, 1988-INA-337 (Jan. 4, 1990) (en banc); *Altobeli's Fine Italian Cuisine*, 1990-INA-130 (Oct. 16, 1991). However, here in objectively assessing the possibility that Employer's impartiality was impaired in conducting this recruitment for the position of domestic cook, the CO was justified in his determination when weighing the adequacy of Employer's recruitment against the likelihood that Employer mis-characterized the position offered.

Based on the above discussion the following order shall enter.

ORDER

The Certifying Officer's denial of labor certification is hereby **AFFIRMED**.

SO ORDERED.

Entered at the direction of the panel by:

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Todd R. Smyth
Secretary to the Board of
Alien Labor Certification Appeals

NOTICE OF OPPORTUNITY TO PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary unless within 20 days from the date of service, a party petitions for review by the full Board of Alien Labor Certification Appeals. Such review is not

favored, and ordinarily will not be granted except (1) when full Board consideration is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance. Petitions must be filed with:

Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, N.W., Suite 400
Washington, D.C. 20001-8002

Copies of the petition must also be served on other parties, and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five double-spaced typewritten pages. Responses, if any, shall be filed within 10 days of the service of the petition, and shall not exceed five double-spaced typewritten pages. Upon the granting of the petition the Board may order briefs.